

APPENDIX H

ESCROW AGREEMENT

THIS AGREEMENT ("Escrow Agreement") is executed as of this ____ day of _____, 2004 ("Effective Date") by and among _____ ("Licensor"), and the STATE OF NEW JERSEY, Department of the Treasury, Division of Purchase and Property, with offices at 33 West State Street, Trenton, NJ 08625 ("State").

RECITALS

- A. State and Licensor have entered into Contract Number _____ (the "Contract"), pursuant to which Licensor must place a copy of the source code and related documentation into escrow as further described in Schedule A (the "Escrow Items"); and
- B. Licensor wishes that the State can maintain an operational version of the Licensed System; and

NOW THEREFORE, in consideration of the promises and mutual covenants contained herein, and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

1. DEPOSIT OF ESCROW ITEMS.

(a) The term "Escrow Items" as used in this Escrow Agreement means the following items:

- i. **Source Code** – all the compilable high-level programming language source code version of the Licensed System, including the software, all corrections, upgrades, updates, modifications thereof as they are available, on disk or magnetic tape media in ASCII format.
- ii. **Related Documentation** – all the related documentation and manuals and other instructions.

(b) Licensor agrees to deposit with the State a complete set of the Escrow Items within thirty (30) days after the Effective Date. Such deposit shall (i) consist of a sealed package certified by an authorized officer of Licensor and witnessed by a representative of the State, to contain a complete set of the Escrow Items as defined in Paragraph 1 (a) above, and (ii) be accompanied by a completed and signed copy of the Description of the Deposit attached hereto as Schedule B (the "Description of Deposit"). The State shall have the right to determine the authenticity of the contents, to witness the sealing of the package, to accompany the package to State, and to witness the deposit of the package in the State's facility. Licensor and the State shall have the same rights with respect to maintenance of the Escrow Items pursuant to Paragraph 2 hereof.

(c) The term "Deposit" as used in this Escrow Agreement means the Escrow Items, deposited with State by Licensor pursuant to this Escrow Agreement.

(d) When State receives the Deposit and the Schedule B, State will conduct a deposit inspection by visually matching the labeling of the tangible media containing the Deposit to the item descriptions and quantity listed on the Schedule B. At completion of the deposit inspection, if State determines that the labeling of the tangible media matches the item descriptions and quantity on Schedule B, State will date and sign the Schedule B and mail a copy thereof to Licensor. If State determines that the labeling does not match the item description or quantity on the Schedule B, State will (i) note the discrepancies in writing on the Schedule B; (ii) date and sign the Schedule B with the

exceptions noted; and (iii) provide a copy of the Schedule B to Licensor. State's acceptance of the deposit occurs upon the signing of the Schedule B by State.

2. REVISIONS AND MAINTENANCE.

(a) Licensor agrees to deposit with State a copy of all the corrections, modifications, upgrades, and updates in accordance with the Contract. Such corrections shall be deposited in a sealed package certified by an authorized officer of Licensor to contain the corrections, modifications, upgrades, and updates. The deposit shall be made by Licensor within thirty (30) days of the date the corrections, modifications, upgrades, and updates were provided to the State.

(b) In the event Licensor delivers a complete replacement copy of one or all of the Escrow Items which contain(s) the most current corrections, modifications, upgrades, and updates, pursuant to the Contract or other contract between Licensor and the State, if any, Licensor shall have the right to request State to return or destroy the corresponding previously deposited Escrow Items.

(c) State shall acknowledge receipt of all corrections, modifications, upgrades, and updates to the Escrow Items by sending written acknowledgement thereof to Licensor in the form of an executed copy of the Description of Deposit.

3. STORAGE AND SECURITY.

(a) State shall act as custodian of the Deposit until the escrow is terminated pursuant to either Paragraph 4 or Paragraph 11 ("Termination") of this Escrow Agreement. State shall establish, under its control, a secure receptacle for the purpose of storing the Deposit.

(b) The Deposit shall remain the exclusive property of the Licensor, subject only to the licenses provided in the Contract and the Escrow Agreement.

(c) State shall not divulge, disclose or otherwise make available the Deposit to any persons other than those persons duly authorized in writing by an officer of Licensor, except as may be necessary for State's authorized representatives to perform under this Escrow Agreement, and except as otherwise provided in this Escrow Agreement.

(d) State's sole responsibility shall be to accept, store, and deliver the Deposit, in accordance with the terms and conditions of this Escrow Agreement.

(e) If any of the Deposit shall be attached, garnished or levied upon pursuant to an order of court, or the delivery thereof shall be stayed or enjoined by an order of court, or any other order, judgment or decree shall be made or entered by any court affecting the Deposit or any part thereof, State is hereby expressly authorized in its sole discretion to obey and comply with all orders, judgments or decrees so entered or issued by any court, without the necessity of inquiring whether such court had jurisdiction, and in case State obeys or complies with any such order, judgment or decree, State shall not be liable for any compliance, notwithstanding that such order, judgment or decree may subsequently be reversed, modified or vacated.

4. RELEASE OF DEPOSIT.

(a) Upon the occurrence of any Event of Default (as defined in Paragraph 7 "Events of Default"), the Deposit shall be released to the State within the next five (5) business days following the end of such thirty (30) day period..

(b) "Contrary Instructions" for the purposes of this Escrow Agreement means a notarized affidavit executed by an official of Licensor stating that the Event or Events of Default specified in the Notice have not occurred, or have been cured.

(c) Upon timely receipt of such Contrary Instructions, State shall not release the Deposit. Subject to Sections 11(b) and (c) hereof, State shall continue to store the Deposit until otherwise directed in writing by Licensor and State jointly, or until resolution of this dispute by a court of competent jurisdiction, or until receipt of a notarized affidavit from an officer of the State, with a copy of the same also delivered to Licensor, that the State requires the Deposit in order to operate and maintain the corrections system. This Escrow Agreement terminates upon the release of the Deposit.

(d) The State shall have the right to make copies of the Deposit, as is reasonably necessary to perform its obligations under this Agreement. The State shall copy all copyright, nondisclosure and other proprietary notices and titles contained on the Deposit onto any copies made by the State. With all Deposit submitted to the State, Licensor shall provide any and all instructions as may be necessary to duplicate the Deposit including, but not limited to, hardware and/or software.

5. REPRESENTATIONS AND WARRANTIES.

Licensor lawfully possesses all right, title and interest to the Deposit, or has the right to license the same and grant the rights accorded to the State and State pursuant to the Contract and this Escrow Agreement, according to the terms thereof. Additionally, the Deposit is not subject to any lien or encumbrance.

6. BANKRUPTCY.

Licensor and the State acknowledge that this Escrow Agreement is an "agreement supplementary to" the license agreement embodied in the Contract, as provided in Section 365(n) of Title 11, United States Code (the "Bankruptcy Code"). Licensor acknowledges that if Licensor as a debtor in possession or a trustee in bankruptcy in a case under the Bankruptcy Code rejects the license agreement embodied in the Subcontract or this Escrow Agreement, the State may elect to retain their rights under the license agreement embodied in the Subcontract and this Escrow Agreement as provided in Section 365(n) of the Bankruptcy Code.

7. EVENTS OF DEFAULT.

The occurrence of any of the following shall constitute an "Event of Default" for purposes of this Escrow Agreement:

(a) Licensor becomes insolvent or generally fails to pay, or admits in writing its inability to pay its debts as they become due; or

(b) Licensor applies for or consents to the appointment of a trustee, receiver or other custodian for Licensor, or makes a general assignment for the benefit of its creditors; or

(c) Any bankruptcy, reorganization, debt arrangement, or other case or proceeding under any bankruptcy or insolvency law, or any dissolution or liquidation proceedings commenced by or against Licensor, and if such case or proceeding is not commenced by Licensor, it is acquiesced in or remains undismissed for sixty days (60) days; or

(d) Licensor ceases to do business, and/or ceases to perform, support and maintain the Deposit under the Contract, the Escrow Agreement or any other applicable agreement with Licensor or the State; or

(e) The Contract is terminated for any reason, pursuant to the Contract or Subcontract terms, prior to the normal expiration dates as are set forth in the Contract; or

(f) Licensor takes any corporate or other action to authorize, or in furtherance of, any of the foregoing.

8. INDEMNIFICATION.

(a) To the extent allowed by New Jersey law, Licensor agrees to defend and indemnify State and to hold State harmless from and against any and all claims, actions, and suits, whether groundless or otherwise, and from and against any and all liabilities, losses, damages, costs, charges, penalties, counsel fees, and any other expense of any other nature including, without limitation, settlement costs incurred by State on account of any act, omission, or negligence of Licensor, in respect of or with regard to this Escrow Agreement; provided, however, that the provisions hereof shall not apply solely in the event of any negligent act or omission on the part of the State.

9. LICENSE GRANT FOR USE OF SOURCE CODE.

Licensor grants the State, their successors and assigns, an irrevocable, nonexclusive, paid-up right and license to use, execute, reproduce, display, perform, maintain, support, upgrade and modify the Deposit, and distribute the same internally, and to prepare derivative works based on the Deposit, exclusively for the operation of the New Jersey Department of Corrections following the occurrence of an Event of Default. The State may engage the services of third parties to enable access to the benefits of the license granted herein. The provisions of this Section 9 shall survive the termination of this Escrow Agreement following the occurrence of an Event of Default.

10. RECORDS.

State agrees to keep complete written records of the activities undertaken and materials prepared and delivered to State pursuant to this Escrow Agreement. Licensor upon reasonable notice to State and during normal business hours, to inspect the facilities of State with respect to the physical status and condition of the Escrow Items.

11. TERMINATION.

The State and Licensor may terminate this Escrow Agreement by mutual written agreement, upon thirty (30) days written notice to State.

12. GOOD FAITH RELIANCE.

State may rely and act upon any instruction, instrument, or signature believed in good faith to be genuine, and may assume that any person purporting to give any writing, notice, respect, advice, or instruction in connection with or relating this Escrow Agreement has been duly authorized to do so

13. NOTICE.

All notices of Event of Default, Contrary Instructions and Termination which are required or permitted by this Escrow Agreement shall be sufficiently served by mailing the same by certified or registered mail, return receipt requested, or reputable overnight courier, to the parties at their respective addresses, as follows:

(a) State:

(b) Licensor:

15. **COUNTERPARTS**

This Escrow Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument.

16. **GOVERNING LAW.**

This Escrow Agreement shall be governed by and construed according to the laws of the State of New Jersey.

17. **SEVERABILITY.**

In the event any of the provisions of this Escrow Agreement shall be held by a court of competent jurisdiction to be contrary to any state or federal law, the remaining provisions of this Escrow Agreement will remain in full force and effect.

18. **HEADINGS.**

The section headings in this Escrow Agreement do not form a part of it, but are for convenience only and shall not limit or affect the meaning of the provisions.

19. **SUCCESSORS AND ASSIGNS.**

This Escrow Agreement shall be binding upon the parties hereto and their successors and assigns. However, State shall have no obligation in performing this Escrow Agreement to any successor or assign of Licensor and the State unless it receives authoritative and conclusive written evidence of the change in status of the parties.

IN WITNESS WHEREOF, the parties have executed this Escrow Agreement as of the date first above written.

LICENSOR:

By:

Name:

Title: _____

STATE OF NEW JERSEY

**Department of Treasury, Division
Of Purchase and Property**

By: _____

Name: _____

Title: _____

**New Jersey Department of
Human Services**

By: _____

Name: _____

Title: _____

Reviewed and Approved as to Form

Assistant Attorney General

Schedule A

Schedule B

I certify for Licensor that the above described deposit has been transmitted to State:

Signature_____

Print Name_____

Date_____

State has inspected and accepted the above materials (any exceptions are noted above):

Signature_____

Print Name_____

Date_____